

UNITED STATES CIVIL SERVICE COMMISSION
Office of the Executive Director
Interagency Advisory Group
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Minutes of IAG Adverse Action and
Appeals Committee
February 8, 1978

Wilma Lehman, of the Policy Analysis and Development Division of the Bureau of Policies and Standards, chaired the meeting. Cameron Smith of the Federal Employee Appeals Authority and Mary Sugar of PADD described and answered questions concerning the CSC's recently released proposals for reorganization and legislative change of particular interest to the Committee. Mr. Smith first outlined some changes under the reorganization plan:

1. The functions of the Commission would be split between two agencies -- the Merit Systems Protection Board and the Office of Personnel Management.
2. The Merit Systems Protection Board would:
 - Adjudicate appeals, except (1) classification appeals unless the classification issue was connected with an adverse action, (2) examination ratings aside from ALJ ratings, and (3) insurance carrier's denial of a claim.
 - Have an office of the Special Counsel, with authority to investigate allegations of prohibited personnel practices, and to bring charges against violators.
 - Make special studies of merit systems to determine if public interest in a workforce free of prohibited practices was being maintained. MSPB would not duplicate functions of OPM in studying any other personnel matters.
3. The Office of Personnel Management would have all CSC functions not given specifically to the Board, including policy-making, recruiting and examining, personnel investigation, evaluation, retirement and insurance, for example. It would be the President's advisor on personnel management. The Director and Deputy Director would be Presidential appointees.

Mrs. Sugar and Mr. Smith next outlined some of the changes proposed under title II of the draft legislative proposal:

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1. Changes in chapter 43 of title 5, which covers performance appraisal,
 - Repeal of requirement for assignment of summary adjective rating.
 - Repeal of performance rating appeals.
 - Consolidation of all purposes for which performance appraisal is required under one system to eliminate conflicting decisions.
 - Simpler procedures for actions taken because of unacceptable performance while providing opportunity for employee improvement before action is taken.
 - o At least 30 days' notice of standard of acceptable performance and identification of areas of unacceptable performance.
 - o Right to a representative.
 - o Written decision.
 - o Appeal to MSPB with no automatic right to hearing.
 - o Decision on appeal based on substantial procedural error, discrimination, or lack of substantial evidence of unacceptable performance.
 - In order to avoid long delays in deciding actions, agencies may provide notice periods of more than 60 days only in accordance with OPM regulations, and must effect decisions within 30 days of the date of expiration or the notice period.
2. Following are changes proposed to chapter 75 of title 5, which covers adverse actions:
 - Short suspensions would no longer be appealable on procedures, but employees would be given right to oral reply and to be accompanied by a representative.
 - Coverage of employees would include nonpreference eligibles in the competitive service but would exclude those in policy-making or confidential positions, and those in Senior Executive Service positions. OPM could extend coverage to positions in the administratively excepted service.

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- Certain actions would be excluded from coverage, among them demotion of first-time supervisors serving a probationary period and demotion or removal under chapter 43, previously noted.
 - Employees would be given right to furnish other documentary evidence in addition to affidavits, and to be accompanied by a representative at the predecision stage.
3. Chapter 77 of title 5, concerning appeals, would be changed in several respects:
- Appellate procedures in section 7701 would cover any action appealable under statute, Executive order or directive, or OPM regulation.
 - o Appeal could be decided on record, with no hearing guaranteed.
 - o Decision would be final unless reopening request made to Board within 30 days by either party or by OPM.
 - EEO review procedures, as long as EEO complaints were heard by the Board, would be under section 7701(d):
 - o Discrimination complaint by employee or applicant would go to agency, which would have 60 days to decide it.
 - o If complaint not resolved to complainant's satisfaction, or no decision made within 60 days, the employee or the applicant could appeal to MSPB.
 - o MSPB would issue final decision on appeal.
 - MSPB could consolidate appeals filed by two or more appellants, or join two or more appeals by one appellant, with one hearing and decision.
 - If an issue of discrimination is raised in connection with an otherwise appealable action, the whole appeal including the discrimination issue would be decided by the Board with no election by the appellant as is currently provide
 - The Board could order payment of reasonable attorney fees to an appellant who is the prevailing party.

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- Arbitration would be made available under Board regulation to an appellant who requested it in a timely manner, if the issue was suitable for arbitration. Costs of arbitration would be paid by the agency.
- Section 7702 would provide judicial review of MSPB decisions.

Under the current reorganization plan, if an OPM regulation, directive, or policy was at issue in an appeal, the Board would be required to notify the Director of OPM, who could then intervene and be a third party to the proceeding.

Members were invited to comment or ask questions. Among those brought up:

- Would a precomplaint process still be required? Mrs. Sugar stated that the EEO Act does not now require such a process, which is provided under Commission regulations. If a pre-complaint procedure were to be provided in the future it would again be done under regulation.
- Would MSPB consider employee and applicant complaints (including those concerning merit promotion) of violation of personnel laws pertinent to the merit system? Mr. Smith noted that the Board through its Special Counsel would have the authority to investigate and bring charges against officials for prohibited personnel practices. Complaints concerning merit promotion would probably not be covered unless they were otherwise tied to prohibited practices. Mr. Smith told the group that section 204 of proposed title I contains a list of prohibited practices.
- Would demotion or separation for unacceptable performance be arbitrable? Mr. Smith said it might be arbitrable under Board regulations, with the same limits placed on the arbitrator as on the Board in these appeals.
- Would back pay provisions be changed in this package? Mrs. Sugar noted that such changes are not included at this time.
- Could a person be removed for unacceptable performance under either procedure? Yes, the procedures for unacceptable performance were not meant to cut off the use of 752B procedures if the agency so chose.
- Will allowing the agencies to set the standard of adequacy permit an agency to separate an employee who is performing 90% effectively and 10% ineffectively in an insignificant regard? Mrs. Sugar noted that there had been a strong reluctance to tell agencies what standard should be applied, and that an agency's action in separating for possibly

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insignificant inefficiency would be closely examined by the Board and overturned if appropriate.

- Would agency payment of arbitration expenses included in the legislative proposal preclude negotiation of cost sharing? It would be precluded, Mr. Smith believes unless authorized by other legislation.

Mrs. Sugar noted several titles not discussed at this meeting, which members may wish to look at: Title III, which covers veteran preference and reduction in force; Title IV, which covers the proposed Senior Executive Service, including procedures for adverse action and performance appraisal for employees in these positions; and Title V, which covers compensation.

Mrs. Lehman told members that comments would be welcome from an agency wishing to comment, whether or not OMB had specifically asked them to comment.